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No. 82-1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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STATE OF MINNESOTA,

Petitioner,

vs.

JOHN HENRY BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

C. Paul Jones
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Respondent, John Henry Brown, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 317 N.W.2d 714.

STATEMENT OF THE CASE

Respondent was convicted of criminal sexual conduct in the first and second degree in Ramsey County District Court in St. Paul, Minnesota, on September 18, 1980. He appealed his conviction to the Minnesota Supreme Court. One of the issues raised upon appeal was whether respondent waived his Fifth Amendment rights to remain silent and to have counsel present during custodial interrogation. In a memorandum decision filed by the Minnesota Supreme Court on December 17, 1981, State v. Brown, 313 N.W.2d 207 (Minn. 1981),

respondent's case was remanded to the trial court for reconsideration of the order denying respondent's pre-trial motion to suppress inculpatory statements in light of this Court's decision in Edwards v. Arizona, __U.S.__, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), which was decided after respondent's pretrial motion had been denied.

The matter was heard by the trial court on January 20, 1982; and on January 25, 1982, respondent's motion for a new trial was granted on the basis that respondent's statements had been improperly admitted at trial. The State of Minnesota, however, was granted a stay of further proceedings to allow it to perfect an appeal to the Minnesota Supreme Court pursuant to Minn. R. Crim. P. 29.03 which provides that a prosecuting authority may appeal to the State Supreme Court in a felony case as a matter of right from any pre-trial order of the trial court except in limited circumstances not applicable in this case. The Minnesota Supreme Court treated the State's appeal from the Order granting a new trial as an appeal from a pre-trial order in that the Order was effectively a pre-trial order suppressing respondent's statements at his new trial.

Relying upon this Court's language in the Edwards decision and upon the fact that this Court has remanded a number of cases for reconsideration in light of Edwards, the Minnesota Supreme Court rejected the State's contention that Edwards established a new rule which should be applied only prospectively and affirmed the trial court's decision that respondent was entitled to a new trial. See, State v. Brown, 317 N.W.2d 714 (1982).

REASONS WHY THE WRIT SHOULD BE DENIED

1. There is no reason to determine whether the holding in Edwards v. Arizona, __U.S.__, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should be accorded retroactive application because that decision did not, as alleged by petitioner, create a new rule of law.

In Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969) the Court stressed that the issue of retroactivity arises only when the Court formulated a "new" rule of law. The test for determining if a new rule has been enacted is whether the rule was a "clear break with the past." Id., 394 U.S. 244, 248, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248, 254. The majority opinion in Edwards, __U.S.__, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 387, clearly states that the holding that an accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by authorities unless the accused initiates such communication is totally consistent with Miranda and its progeny. Thus there is no "clear break with the past," and the issue of retroactivity becomes academic.

2. There is no unresolved question as to whether police may reinterrogate an accused who has asked for an attorney's presence but who has not been provided one. The decision in Edwards v. Arizona, __U.S.__, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 386 (1980) clearly prohibits this unless the accused initiates the conversation. The lower court's decision that respondent did not waive his right to deal with the police only through counsel is based upon application of this rule of law.

3. There is no factual basis to support petitioner's allegation that respondent's statement was not a product of custodial interrogation. The situation in respondent's

case is not analogous to that in Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). At the time respondent's statement was obtained, he was being formally interrogated by a police officer. He had been in custody for approximately seventeen hours. He was specifically asked about the events which led to his arrest. The police officer's only purpose in talking to respondent was to obtain a written statement. It is preposterous for petitioner to allege that this was not a practice the officer knew was reasonably likely to evoke an incriminating response from a suspect so as to constitute "interrogation" under the definition enunciated in Rhode Island v. Innis.

CONCLUSION

For the reasons advanced in this argument and those in the opinion of the Minnesota Supreme Court in State v. Brown, 317 N.W.2d 714 (Minn. 1982), Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

C. Paul Jones
Minnesota State Public Defender

Mollie G. Raskind
Deputy State Public Defender
Counsel of Record

Susan K. Maki
Assistant State Public Defender

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ATTORNEYS FOR RESPONDENT

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46, paragraphs 1, 4, of the Rules of this Court, motion is hereby made that respondent be deemed to comply with the in forma pauperis requirement. Respondent's affidavit is attached to this motion.

Dated: May 12 1982

C. PAUL JONES
Minnesota State Public Defender

By: Mollie G. Raskind
Mollie G. Raskind
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95 Law Center
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COUNSEL FOR RESPONDENT

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STATE OF MINNESOTA, Petitioner

vs.

JOHN HENRY BROWN, Respondent

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF MINNESOTA)
) ss
COUNTY OF WASHINGTON)

I, John Henry Brown, being duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees.

1. I am the respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. The present proceeding was commenced by the State of Minnesota on a Petition for a Writ of Certiorari to review the order of the Minnesota Supreme Court which affirmed the pre-trial order of the trial court.

5. I believe I am entitled to the affirmance of the Minnesota Supreme Court Order which I seek, and am making this affidavit in good faith.

John H. Brown
John Henry Brown

Subscribed and sworn to
before me this 11th
day of May, 1982.

Ronald E. Hunter
Notary Public

RONALD E. HUNTER
NOTARY PUBLIC — MINNESOTA
WASHINGTON COUNTY
My commission expires Jan. 29, 1985